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Supreme Court, U.S.
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No. 96-98

**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1995**

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K MART CORPORATION,

*Petitioner,*

v.

CARL HELTON, CHARLES W. KEMPTON, NICK PAYNE, JAMES E. TAYLOR, BOB WILLIAMS, AND DAVID JACK WRIGHT,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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# RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the district court had acted within its discretion by allowing an "opt-in" class of former Kmart Southern Region Store Managers to pursue ADEA claims collectively under 29 U.S.C. § 216(b), where those Store Managers had, according to the court of appeals, "made substantial allegations and provided evidentiary support for their contention that they were victims of an age-motivated purge in K Mart's Southern Region from 1990 to 1992?"

2. Whether the court of appeals correctly held that the district court had acted within its discretion by permitting the original five plaintiffs to amend their complaint so as to convert the action to an "opt in" collective action under 29 U.S.C. § 216(b) at the end of the time period for discovery prescribed by the district court's local rules, based on the evidence of an age-motivated purge that had been amassed during discovery?

3. Whether, as the circuit courts have uniformly held, the "piggybacking," or "single filing," rule is available in ADEA cases, so that individuals who did not file their own discrimination charges with the Equal Employment Opportunity Commission may assert ADEA claims in court, where those claims are encompassed by EEOC charges filed by others?

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3 Moore's Federal Practice ¶ 15.08[2] (1994) . . . . . 14

## OPINIONS BELOW

The opinion of the court of appeals is published at 79 F.3d 1086. The opinion of the district court is reproduced as an appendix to the court of appeals' published opinion.

## JURISDICTION

The judgment of the court of appeals was entered on April 9, 1996. The court of appeals denied Kmart's motion for rehearing and both parties' separate suggestions of rehearing en banc on June 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

### 1. Course of Proceedings and Disposition Below

*Kmart Corporation v. Grayson, et al.* (the "*Grayson*" case) and *Kmart Corporation v. Helton, et al.* (the "*Helton*" case) were originally two multi-plaintiff actions brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* (the "ADEA"). The eleven original *Grayson* plaintiffs filed their complaint on January 17, 1992. The five original *Helton* plaintiffs filed their complaint on October 29, 1992.

The complaints in both cases allege that the plaintiffs were victims of an age-motivated purge of Store Managers in Kmart's Southern Region that began in 1990, following a company-wide reorganization and the installation of a new Vice President of Kmart's Southern Region. Between 1990 and 1992, Kmart demoted approximately 151 Southern Region Store Managers and approximately 76 more resigned. This purge eliminated

approximately one-third of all Store Managers in the Southern Region. Each plaintiff was removed from his Store Manager job and assigned to a lower position.

The plaintiffs allege Kmart carried out its purge of older Store Managers using a technique known throughout Kmart as "building a case" or "building a file." Kmart would target older Store Managers for elimination and then "build a case" against them by subjecting them to months of intense scrutiny and unrelenting criticism. The company methodically filled the targets' personnel files with criticisms and threats. Those managers who did not resign under the pressure of this inquisition would be demoted based upon the so-called "record" that had been compiled. Each plaintiff's personnel file contains some 40 to 60 critical reports, the great majority of which were generated in the months immediately preceding his demotion.

In January of 1993, Kmart moved to sever the claims of the five *Helton* plaintiffs and transfer their cases to the districts in which the stores that they had managed were located. Kmart argued that the cases did not meet the standard for joinder under Rule 20, Fed. R. Civ. P.[1] In April of 1993, Kmart filed an essentially identical motion in *Grayson*. On September 30, 1993, the Honorable Marvin K. Shoob (who was presiding over the *Helton* case) denied Kmart's severance motion in *Helton*.

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[1] Rule 20(a) provides, in pertinent part:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transaction or occurrences and if any question of law or fact common to all these persons will arise in the action.

On February 22, 1994, the Honorable Julie E. Carnes (who was presiding over the *Helton* case) granted Kmart's severance motion in *Grayson*, breaking up that case into eleven separate civil actions. In a separate order, Judge Carnes then transferred the five *Grayson* plaintiffs who had managed Kmart stores outside of Georgia to a total of four other United States District Courts.

On February 28, 1994, the *Helton* plaintiffs moved to amend their complaint to specify that the action was brought, under 29 U.S.C. § 216(b),[2] on behalf of the named plaintiffs and others "similarly situated." The plaintiffs asked the district court to allow additional plaintiffs to intervene if they fell within the following definition of "similarly situated" individuals:

> Each person who (1) was demoted from the position of General Store Manager of any store in Kmart's Southern Region at any time between January 1, 1990 and December 31, 1992, or who resigned from such a position during the same time period after being told that he or she would be demoted if he or she did not resign, and (2) was, at the time of the demotion or resignation, at least 40 years old.

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[2] Section 216(b) provides that:

> An action to recover the liability prescribed . . . may be maintained in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Judge Shoob granted this motion in an order entered July 21, 1994. Each of the five district judges presiding over the various severed *Grayson* plaintiffs (including Judge Carnes) allowed those plaintiffs, in one way or another, to discontinue prosecution of their individual suits and join in the *Helton* class action. In addition to the eleven *Grayson* plaintiffs, ten other demoted Kmart Store Managers filed notices opting in to the *Helton* case.

Judge Shoob subsequently modified slightly the temporal scope of the "opt-in class" and certified his July 21 order for interlocutory appeal. The court of appeals granted leave to pursue the interlocutory appeal in *Helton*.[3]

On April 9, 1996, the court of appeals issued its ruling in the *Helton* appeal. The court affirmed Judge Shoob's class order in all respects, except that it modified Judge Shoob's "temporal definition" of the class; that is, the time frame within which individuals had to have been demoted in order to meet the applicable statutes of limitations and thus be able to "opt in" as plaintiffs.

Without reservation or ambiguity, the court of appeals endorsed the plaintiffs' central contention, that the claims of all store managers demoted in the 1990-92 purge should be litigated collectively. The court held that the evidentiary record was "more than sufficient" to meet the requirements for collective litigation under *both* 29 U.S.C. § 216(b) and Fed. R. Civ. P. 20:

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[3] While the *Helton* appeal was pending, the Equal Employment Opportunity Commission sought and obtained permission from Judge Shoob to intervene in the *Helton* case under 29 U.S.C. § 626(b).

> Essentially we hold that the "similarly situated" requirement of § 216(b) is more elastic and less stringent than the requirements found in Rule 20 (joinder) and Rule 42 (severance). We also hold that a unified policy, plan, or scheme of discrimination may not be required to satisfy the more liberal "similarly situated" requirement of § 216(b), even though in the instant case, we are persuaded that the allegations, affidavits, and depositions meet a standard of greater stringency than the "similarly situated" standard found in § 216(b). Indeed in this case, the record is more than sufficient to meet either standard.

*Grayson v. K Mart Corp.*, 79 F.3d 1086, 1095-96 (11th Cir. 1996).

The court of appeals relied largely on *Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989), observing that collective litigation is favored under the ADEA. *See* 79 F.3d at 1096, *quoting Sperling*, 493 U.S. at 170 ("Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively."). In addition, the court examined the record and found a substantial quantity of evidence showing that the Store Manager demotions were part of "an age-motivated purge in K Mart's Southern Region":

> [T]he plaintiffs have made substantial allegations and provided evidentiary support for their contention that they were victims of an age-motivated purge in K Mart's Southern Region from 1990 to 1992.

79 F. 3d at 1097. The court of appeals devoted several pages of its opinion to a summary of the plaintiffs' extensive evidence of the purge. 79 F.3d at 1097-99.

The Eleventh Circuit subsequently denied Kmart's motion for rehearing and both parties' separate suggestions of rehearing en banc.[4]

**2. Statement of Facts**

The record contains a dramatic and substantial body of evidence that Kmart had a plan to eliminate older Store Managers in its Southern region. Each plaintiff relies on this body of evidence to argue that his demotion was part of the discriminatory plan and hence motivated by age. The hundreds of factual and legal issues arising from this body of evidence are exactly the same in each plaintiff's case. It would be logistically and financially impossible for the plaintiffs to present this evidence effectively in individual cases. This is why the plaintiffs contend (and the Eleventh Circuit has held) that the claims must be litigated collectively under 29 U.S.C. § 216(b).[5]

The Eleventh Circuit discussed much of the plaintiffs' collective evidence in its opinion. 79 F.3d at 1097-99. For illustrative purposes, we reproduce an excerpt here.

> The plaintiffs' statistical expert, Leonard Cupingood, stated in his affidavit that . . . "the disparity between the actual and expected number of older store

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[4] The plaintiffs' suggestion of rehearing en banc addressed solely the panel's controversial decision on certain statute of limitations issues, which govern the "temporal scope" of the opt-in class. The plaintiffs anticipate filing their own petition for a writ of certiorari to review the court of appeals' resolution of the statute of limitations issues.

[5] This is also why breaking up a multi-plaintiff suit into many individual cases represents such an attractive defense strategy in ADEA and other employment discrimination cases.

managers who were demoted is statistically significant" for the period between January 1, 1990 and December 31, 1992. (Cupingood Aff. at 3).

The evidence before Judge Shoob also showed that K Mart decisionmakers, from the Southern Region's Vice President up to K Mart's CEO, expressed their intent to purge K Mart of older managers. Joseph Antonini, who became President, CEO and Chairman of K Mart in 1987, acknowledged at [his] deposition that he had undertaken a "program to renew" K Mart's image. (Antonini Dep. at 31)(HR-104, Ex. 4). On October 10, 1989, Antonini gave a press briefing on "K Mart's present and future direction," in which he reported that:

> K Mart has one of the youngest and most aggressive management teams in retailing today. The average age of the 32-person corporate officer group is less than 50 years old with an average retail experience exceeding 22 years. Our store managers average 15 years service in our company. K Mart is confident that the team in place will move the company forward.

(Transcript of Remarks of J.E. Antonini at Press Briefing of Oct. 10, 1989, at 3)(HR-104, Ex. 4). Antonini had made similar comments in a speech on September 12, 1990, that was broadcast over K Mart's satellite network. (Antonini Dep. At 30). He testified that he was "proud" of the management team because they "had a lot of experience and a lot of longevity left." (Antonini Dep. At 39).

Don Keeble, K Mart's director of nationwide store operations made similar remarks. According to third parties who had dealt with Keeble in negotiating contracts for the cleaning of K Mart's stores, Keeble said that K Mart was "'working to change its image,'" and wanted its stores to "'have a fresher, cleaner, and younger look.'" (Powers Aff. At 2)(HR-104, Ex.3). Keeble also said that the "'problem'" that K Mart had with its older store managers was that they "'were accustomed to the old way of doing things,'" but that he "'didn't want to re-educate these people, because they still wouldn't fit into the spirit of the new image that he and Mr. Antonini wanted;'" *id.*, that "'K Mart was promoting a younger image in management,'" (Marzano Aff. at 2), and that K Mart had a lot of "'old wood'" that was really "'dead wood.'" *Id.* at 3.

Similarly, prior to becoming K Mart's Southern Regional Vice President, John Valenti said: "That's the trouble with K Mart. It's these older store managers. But we are planning to do something about it." (Marzano Supp. Aff. at 3) (HR-104, Ex. 2). Furthermore, the plaintiffs allege that after John Valenti became K Mart's Regional Vice President of the Southern Region, the job performance evaluations of the older store managers nearly all dropped from "Competent" or "Commendable" to "Needs Improvement," "Unsatisfactory," or "Below Expectations," while there was no similar downgrading of younger store managers' performances. (Pl's Initial Brief at 14-17). Indeed, the chart which Robert McAllister, Valenti's predecessor as Southern Region Vice President, created at the instruction of Tom Watkins, K Mart's Senior Vice President of Store

> Operations, reveals that every manager under the age of thirty-nine who had been rated "Below Expectations" was scheduled to be reappraised in the near future, while six of the eight of the managers over the age forty-five who had been rated "Below Expectations" [were] demoted or resigned. (Summary Chart, Mar. 23, 1990)(HR-104, Ex. 26).
>
> The plaintiffs further allege that K Mart targeted older store managers for criticism and built a paper trail that would be grounds for their demotion. On November 1, 1985, McAllister and another Region Manager, Clifton, sent a confidential memorandum to all district managers notifying them that a new store management structure would "most probably" be in place in the near future, and instructing them to begin "building a case" to terminate low performing Resident Assistant [store] managers. (Confidential Mem. from McAllister and Clifton to District Managers, Nov. 1, 1985)(HR-104, Ex. 26). In 1988, Valenti assured David Marzano, who had contracted to clean K Mart's stores, that if Marzano encountered any problems with the older store managers, he, Valenti, would "build a file" on that manager. (Marzano Supp. Aff. at 3)(HR-104, Ex. 2). Charles Wester, a Southern Region Loss Prevention District Manager, testified that he was criticized by Valenti for not having done more to build cases against older store managers. (Wester Dep. At 264)(HR-104, Ex. 49).

79 F.3d at 1097-98 (footnote omitted).

## REASONS FOR DENYING THE WRIT

Kmart's petition asks this Court to review noncontroversial and mostly discretionary rulings. There is no split of authority among the circuits as to any issue Kmart raises.

### 1. The Decision to Permit the Case to Proceed Collectively under 29 U.S.C. § 216(b) Lay Within the District Court's Discretion and Was Fully Justified by the Record.

The decision to permit collective ADEA litigation under 29 U.S.C. § 216(b) has been uniformly held to lie within the district court's discretion, and no court of appeals has ever reversed a district court for either permitting or denying collective status in such a case. *Grayson v. K Mart Corp.*, 79 F.3d at 1097; *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1213 (5th Cir. 1995)("Once the correct legal standard is ascertained, the district court's application of the standard must be reviewed for abuse of discretion."). The ruling below, allowing individuals with evidence that they had been caught up in the 1990-92 purge of Kmart's Southern Region to sue collectively, comports with this Court's holding in *Hoffman-La Roche, Inc., v. Sperling*, 493 U.S. 165 (1989), encouraging collective ADEA litigation. The ruling is fully justified by the substantial body of evidence, upon which each individual plaintiff relies, that Kmart's purge of managers was age-motivated. The ruling properly recognizes that it would be impossible for each manager to present this evidence effectively in an individual trial.

In *Sperling*, this Court held that a district court may authorize and facilitate notice of a collective ADEA action brought under 29 U.S.C. § 216(b). The district court's active

involvement in the notification process, the Court held, gave effect to a statutory policy favoring collective ADEA litigation:

> The ADEA, through incorporation of §216(b), expressly authorizes employees to bring collective age discrimination actions "in behalf of . . . themselves and other employees similarly situated." 29 U.S.C. §216(b) (1982 ed). Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively. A collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.
>
> These benefits, however, depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate.

493 U.S. at 170.

Kmart challenges the Eleventh Circuit's ruling that the "similarly situated" test of § 216(b) is less demanding than the Rule 20 test for joinder. Petition at 12-13. Kmart argues that *Sperling* should be read to restrict collective ADEA cases to those that satisfy the standard for joinder under Rule 20, Fed. R. Civ. P. Kmart claims that *Sperling* intentionally invoked the "common issues of law and fact" standard of Rule 20:

> The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.

493 U.S. at 170.

The suggestion that *Sperling* restricts collective ADEA litigation to those cases where it is already permitted under Rule 20 makes no sense. *Sperling* emphasizes that congressional policy favors collective litigation of ADEA cases. Since all federal court litigation is subject to Rule 20, *Sperling* has to mean that the ADEA offers a greater opportunity for joinder then other claims; otherwise, the pronouncement that collective litigation is favored in ADEA cases would be meaningless. The language Kmart quotes means simply that the considerations favoring joinder in all federal court litigation--efficiency and economy--also favor collective ADEA litigation.

Moreover, any distinction between the § 216(b) "similarly situated" test and the Rule 20 joinder standard would be academic here, because the court of appeals held that the record " is more than sufficient to meet either standard." 79 F. 3d at 1095-96.

The court of appeals' decision does not conflict with any other circuit court decision, including the Fifth Circuit's ruling in *Mooney*. *Mooney* affirmed, also under the "abuse of discretion" standard, a district court's decision to "decertify" an ADEA class shortly before trial. The court concluded:

> From the record, it is apparent that in this case, no mater how we analyze the similarly situated requirement, we cannot say that the district court

> abused its discretion in finding that the "opt-in" plaintiffs were not similarly situated.

54 F.3d at 1216.

In marked contrast to this case, the *Mooney* record contained no common core of evidence showing a plan to purge older employees:

> Other than the global allegations of Plaintiffs that the ADEA was violated, that they were formerly Aramco employees, and that they were in the protected age group over forty, there is no real commonality among the named Plaintiffs and the "opt-in" group.

54 F.3d at 1215. Of course, the mere fact that the district court in *Mooney* had decertified a class, while the district court here approved a class, does not create a conflict between the two appellate decisions.

**2. The Timeliness of the Plaintiffs' § 216(b) Motion Lay Within the District Court's Discretion.**

Kmart contends that Judge Shoob should have denied the plaintiff's § 216(b) motion because it was filed too late in the case. At most, this amounts to an argument that Judge Shoob abused his discretion by allowing the plaintiffs to amend their complaint so as to explicitly state that the action was brought on behalf of other "similarly situated" plaintiffs under § 216(b).

This decision rested within the district court's discretion. There are, moreover, few federal policies more solidly established than that favoring liberality of pleading amendments.

*Foman v. Davis*, 371 U.S. 178 (1962); 3 *Moore's Federal Practice* ¶ 15.08 (1994).

The timing of the class amendment made perfect sense and did not prejudice Kmart. Much of the plaintiffs' "evidentiary support for their contention that they were victims of an age-motivated purge in K Mart's Southern Region from 1990 to 1992," 79 F.3d at 1097, was gathered during the discovery period. Had the plaintiffs sought class treatment earlier, Kmart doubtless would have resisted certification as premature. As did the substance of the § 216(b) ruling, the timing lay fully within Judge Shoob's discretion, and does not merit grant of the writ.

### 3. The "Piggybacking," or "Single Filing," Rule is Universally Applied in ADEA Cases.

The "piggybacking," or "single filing," rule, permits an individual to assert a Title VII or ADEA claim in federal court without first having filed a charge of discrimination with the Equal Employment Opportunity Commission. The plaintiff "piggybacks" on one or more charges filed by others, where those charges put the employer on notice that others might assert similar claims and thereby fulfill the purpose of the EEOC charge for a class of potential plaintiffs.

The piggybacking rule is not controversial. Every circuit to have addressed the issue has permitted "piggybacking" by ADEA plaintiffs. *Howlett v. Holiday Inns, Inc.*, 49 F.2d 189, 194 (6th Cir. 1995); *Anson v. University of Texas Health Science Center*, 962 F.2d 539, 540 (5th Cir. 1992)("The federal courts now universally hold that an individual who has not filed an administrative charge can opt-in to a suit, filed by any similarly situated plaintiff under certain conditions.").

The Eleventh Circuit held that piggybacking was available in ADEA cases, but applied an extremely narrow version of the rule. Among other things, it held that a § 216(b) opt-in plaintiff may piggyback only on a charge filed by an individual who later turns out to be an original named plaintiff in the "class" action, even though a charge filed by another would have given the employer the same notice and opportunity to conciliate the claims of the potential class. 79 F.2d at 1102-05. Kmart cannot, therefore, seriously challenge the manner in which the court of appeals applied the rule, only its decision whether to apply it at all. Since piggybacking is universally recognized, the Eleventh Circuit's decision does not warrant granting the writ.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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